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Supreme Court of the United States

October Term, 1968

No. 1

A. P. HUDSON and H. ISAIAH SMITH, Receivers of Fidelity Assurance Association, by the Circuit Court of Kanawha County, West Virginia, and FIDELITY ASSURANCE ASSOCIATION, a Corporation,

Petitioners,

vs.

H. E. GRANT, L. H. BROOKS, Trustee, ELBRIDGE W. PALMER and R. L. MALONEY, Tennessee Resident Contract Holders of Fidelity Assurance Association,

Respondents.

AMICI CURIAE BRIEF OF IRA J. PARKLOW, ATTORNEY GENERAL, ON BEHALF OF EDGAR R. SIMS, AUDITOR AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA; CHARLES B. PERSONS, INSURANCE COMMISSIONER OF IOWA; FORD C. ELLIOTT, ATTORNEY GENERAL, FOR EDWARD N. WARNER, INSURANCE COMMISSIONER, MICHIGAN CORPORATION AND SECURITIES COMMISSION; GROVER SELLERS, ATTORNEY GENERAL OF TEXAS; EUGENE COOK, ATTORNEY GENERAL OF GEORGIA; J. TOM WATSON, ATTORNEY GENERAL OF FLORIDA; J. A. A. BURNQUIST, ATTORNEY GENERAL OF MINNESOTA; CLAIR JOHN KILLORAN, ATTORNEY GENERAL OF [illegible]WAKE; BARTON K. GRIFFITH, KANSAS ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; PETER F. HAGAN AND I. M. KREKSTEIN, PENNSYLVANIA ANCILLARY RECEIVERS OF FIDELITY ASSURANCE ASSOCIATION; DEWEY K. GODFREY, MISSOURI ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; J. W. JONES, KENTUCKY ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; DALE SUNDOM, SPECIAL MASTER COMMISSIONER IN OHIO FOR FIDELITY ASSURANCE ASSOCIATION; S. LEIGH CALL, DEPUTY LIQUIDATOR, FORMERLY IN CHARGE IN ILLINOIS OF LIQUIDATION OF FIDELITY ASSURANCE ASSOCIATION; ROBERT M. RIESER, A WISCONSIN CASH SURRENDER VALUE CONTRACT HOLDER, ON BEHALF OF HIMSELF AND OTHER WISCONSIN CASH SURRENDER VALUE CONTRACT HOLDERS OF FIDELITY ASSURANCE ASSOCIATION; JOHN E. GONTRUM, INSURANCE COMMISSIONER OF MARYLAND; ALEX W. NEAL, JR., ANCILLARY RECEIVER FOR FIDELITY ASSURANCE ASSOCIATION IN VIRGINIA; FIDELITY TRUST COMPANY AND WILLIS N. COVAL, ANCILLARY CO-RECEIVERS IN INDIANA OF FIDELITY ASSURANCE ASSOCIATION,

Robert W. Kenny Co-Counsel

BARNETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

STATEMENT OF THE CASE 2

ARGUMENT 5

Cases Cited

Fidelity Assurance Association, et al., vs. *Edgar B. Sims, Auditor, etc., et al.*, 318 U. S. 608, 87 L. Ed. 1032 2

State ex info. McKittrick, Attorney General, et al., vs. *Fidelity Assurance Association, et al.* (Mo. 1944), 179 S. W. (2d) 67 5

In re *Fidelity Assurance Association*, 247 Wis. 619, 20 N. W. (2d) 638; 248 Wis. 373, 21 N. W. (2d) 730 5

Blake v. *McClung*, 172 U. S. 239, 43 L. Ed. 432 11

Pennsylvania and Ohio v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 325

A. P. HUDSON and H. ISAIAH SMITH, Special Receivers of Fidelity Assurance Association Appointed by the Circuit Court of Kanawha County, West Virginia, and FIDELITY ASSURANCE ASSOCIATION, a Corporation,

Petitioners,

vs.

H. E. GRANT, L. H. BROOKS, Trustee, ELBRIDGE W. PALMER and R. L. MALONEY, Tennessee Resident Contract Holders of Fidelity Assurance Association,

Respondents.

AMICI CURIAE BRIEF OF IRA J. PARTLOW, ATTORNEY GENERAL, ON BEHALF OF EDGAR B. SIMS, AUDITOR AND EX-OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA; CHARLES R. FISCHER, INSURANCE COMMISSIONER OF IOWA; FOSS O. ELDRED, ATTORNEY GENERAL, FOR HOWARD M. WARNER, COMMISSIONER, MICHIGAN CORPORATION AND SECURITIES COMMISSION; GROVER SELLERS, ATTORNEY GENERAL OF TEXAS; EUGENE COOK, ATTORNEY GENERAL OF GEORGIA; J. TOM WATSON, ATTORNEY GENERAL OF FLORIDA; J. A. A. BURNQUIST, ATTORNEY GENERAL OF MINNESOTA; CLAIR JOHN KILLORAN, ATTORNEY GENERAL OF DELAWARE; BARTON E. GRIFFITH, KANSAS ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; PETER F. HAGAN AND I. H. KREKSTEIN, PENNSYLVANIA ANCILLARY RECEIVERS OF FIDELITY ASSURANCE ASSOCIATION; DEWEY S. GODFREY, MISSOURI ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; J. W. JONES, KENTUCKY ANCILLARY RECEIVER OF FIDELITY ASSURANCE ASSOCIATION; DALE DUNIFON, SPECIAL MASTER COMMISSIONER IN OHIO FOR FIDELITY ASSURANCE ASSOCIATION; S. LEIGH CALL, DEPUTY LIQUIDATOR, FORMERLY IN CHARGE IN ILLINOIS OF LIQUIDATION OF FIDELITY ASSURANCE ASSOCIATION; ROBERT M. RIESER, A WISCONSIN CASH SURRENDER VALUE CONTRACT HOLDER, ON BEHALF OF HIMSELF AND OTHER WISCONSIN CASH SURRENDER VALUE CONTRACT HOLDERS OF FIDELITY ASSURANCE ASSOCIATION; JOHN B. GONTRUM, INSURANCE COMMISSIONER OF MARYLAND; ALEX W. NEAL, JR., ANCILLARY RECEIVER FOR FIDELITY ASSURANCE ASSOCIATION IN VIRGINIA; FIDELITY TRUST COMPANY AND WILLIS N. COVAL, ANCILLARY CO-RECEIVERS IN INDIANA OF FIDELITY ASSURANCE ASSOCIATION.

STATEMENT OF THE CASE

The opinions below, jurisdiction and statutes involved are fully set forth in the briefs of the parties to the case.

Edgar B. Sims, Auditor of the State of West Virginia and ex-officio Insurance Commissioner of the State of West Virginia, was the leading and named respondent in the case of *Fidelity Assurance Association, et al.*, vs. *Edgar B. Sims, Auditor, etc., et al.*, 318 U. S. 608, 87 L. Ed. 1032, and the officials of the States of Iowa, Missouri, Wisconsin and Maryland, and certain Tennessee contract holders, respondents in the instant case, together with the West Virginia Receivers, the petitioners in this instant case, were the remaining respondents.

The Attorneys General and other officials of the States of Kentucky, Kansas, Illinois, Indiana, Ohio, Delaware, Virginia, Pennsylvania and Texas were joined in a brief *amici curiae* in support of respondent *Edgar B. Sims, et al.*, in that case, together with the Attorneys General and officials of several other states.

The instant case is an outgrowth of, and a part of, that same case. As stated in that case, Fidelity Assurance Association, a West Virginia corporation, was licensed to do business in each of the states whose officials appear before the Court in this joint *amici curiae* brief, except the States of Texas, Florida, New York and Minnesota. In the States of Delaware, Iowa, Wisconsin, Illinois, Missouri, Maryland, Kentucky, Kansas, Indiana, Ohio, Virginia, Pennsylvania and West Virginia there was a statutory requirement for Fidelity to make a deposit of assets in each of those states. In several of these states, including the State of Tennessee, such deposit was to be for the benefit of those residents who had cash values to their contracts, and in most instances the amount of deposit was required to be the amount owed by Fidelity in

cash to its contract holders at the time of the deposit, the amount of cash so owed being determined by the terms of the contract and the tables therein. (R. 15).

The case of *Fidelity, et al.* vs. *Sims, et al. (supra)* arose by reason of a petition filed by Fidelity for reorganization under Chapter X of the Bankruptcy Act, whereafter several of the officials of such depositary states, spearheaded by Edgar B. Sims, Auditor of West Virginia, attacked the jurisdiction of the United States District Court for the Southern District of West Virginia to entertain such petition, and the case ultimately reached this Court.

In the opinion of that case the facts as to how the deposits were created and maintained were fully discussed, with the States' Attorneys General and officials contending that there was a trust lien on each of the state deposits for the benefit of each of the contract holders of each depositary state who had a cash surrender value to his contract, and that such trust lien could not be set aside in any distribution of the assets. That contention was fully sustained in the opinion of this Court by Mr. Justice Roberts. (318 U. S. 617).

Those states which did not have a state deposit contended, as did the Attorney General of West Virginia on behalf of the Auditor, that the deposit in West Virginia was for the benefit of the resident contract holders of West Virginia, together with the resident contract holders of all such non-depositary states, and that surpluses existing in other state deposit funds should be returned to West Virginia for the use of all such contract holders. That contention was likewise affirmed by this Court in that case. (318 U. S. 619).

Following the decision of this Court, each of the depositary states, in their own state court proceedings, but

working mutually and cooperatively together, liquidated and distributed their assets in accordance with the opinion of this Court, except in the State of Tennessee.

There the contract holders who had been parties to the case of *Fidelity* vs. *Sims, supra,* in the Chancery or trial court, obtained a ruling for distribution in accordance with the opinion of this Court. After such distribution order had apparently become final, and just prior to actual distribution, one contract holder, for himself alone, attacked the method of distribution, and the controversy was carried through the Court of Appeals to the Supreme Court of Tennessee, which handed down a final decision sustaining a method of distribution contrary to the opinion of this Court, and contrary to that decided by the Courts of all the other depositary states.

This method of distribution in effect retained all of the deposit in Tennessee, and kept the surplus of the deposited assets from being returned to West Virginia.

Those who join in this brief are interested from two different viewpoints. Some of them, as officials in charge in depositary states, have returned surpluses to West Virginia, in accordance with this Court's opinion, for the benefit of all contract holders throughout the United States; others not having sufficient assets to make full distribution themselves, or being officials of non-depositary states, look to the West Virginia deposit fund for reimbursement for their contract holders. The failure of the authorities in Tennessee to return the surplus to the West Virginia Receivers and officials, will damage their contract holders, by depriving them of the distribution through West Virginia officials of the surplus of the Tennessee deposit, which should have been returned to West Virginia.

ARGUMENT

Edgar B. Sims, Auditor and Ex-officio Insurance Commissioner of West Virginia, should properly have been made a party to the proceedings in Tennessee. He was the leading party respondent in the case of *Fidelity* vs. *Sims, supra,* and became a party in each of the state proceedings wherein there was any contest or litigation.

See, *state ex info. McKittrick, Attorney General, et al.,* vs. *Fidelity Assurance Association, et al.* (Mo. 1944), 179 S. W. (2d) 67; *In re Fidelity Assurance Association,* 247 Wis. 619, 20 N. W. (2d) 638; and *In re Fidelity Assurance Association,* 248 Wis. 373, 21 N. W. (2d) 730.

In a substantially identical case in Wisconsin, in which the Auditor of West Virginia was an actual party, it was there held that the surplus in Wisconsin sould be returned to the proper officials in West Virginia. See, *In re Fidelity Assurance Association,* 247 Wis. 619, 20 N. W. (2d) 638, and *In re Fidelity Assurance Association,* 248 Wis. 373, 21 N. W. (2d) 730. This likewise was the decision of the Chancery Court of Tennessee, which heard the evidence and considered the matter fully, and the decision of each of the Courts in every depositary state save Tennessee.

The reasons why cash surrender value should have been held in Tennessee to be the proper basis of distribution have been fully set up in the briefs of the parties. Nevertheless, the Attorney General of West Virginia wishes to reiterate his belief that this matter was formerly decided by this Court, and that the Courts of Tennessee have apparently made their decisions for the sole and selfish purpose of trying to retain all of the Fidelity deposit for the benefit of residents of Tennessee, regardless of the legal or equitable situation, and that in so

doing those courts have violated the due process clause of the Constitution of the United States.

A curious anomaly results from the decision of the Supreme Court of Tennessee. At all times prior to the actual instant of declared insolvency, the deposit in Tennessee was for the sole benefit of Tennessee resident contract holders with cash surrender values to their contracts. These persons were fully protected to the extent of 100% of their cash surrender values, and at any time up until the instant of the declared insolvency, could have withdrawn the full amount of their cash surrender values. The surplus would have had to be returned to West Virginia. Persons without cash surrender values to their contracts, by the very terms of those contracts, had no rights against, or liens upon, the deposit fund prior to insolvency.

Yet, although this fund was created by legislative act for the protection of those persons with cash values to their contracts, as required by the specific terms of the contracts they had purchased, yet the net result of the decision of the Supreme Court of Tennessee is that the instant after declared insolvency, the fund no longer was a protection for such cash surrender values, but became general assets, subject to the claims of all Tennessee residents for damages for breach of contract. To correct this incongruous situation is one of the reasons why this *amici curiae* brief is filed.

A brief resume of the situation in the other states is pertinent.

In Iowa, the Insurance Commissioner, in proceedings in the Circuit Court of Polk County, made distribution to Iowa residents on the cash surrender value basis, paid all expenses, and has returned the surplus to West Virginia.

In Kansas there was a statutory requirement for a deposit up to and including 1935, with no deposit requirement thereafter. The Circuit Court of Shawnee County held that those protected by the deposit should receive 100% of the cash surrender value of their contracts, but should not receive interest thereon, and that the surplus should be returned to West Virginia to be a part of the deposit fund, and all of the Kansas contract holders who were unprotected by the state deposit law should look solely and primarily to the West Virginia deposit fund, all of which has long since been done.

In Indiana there was a deposit law from 1929 through 1935, and another deposit law from 1939 through 1941. The Court there decided that each of those contract holders protected during the period of the existence of the deposit statutes should be protected to the extent of 100% of the cash surrender value of their contracts, all surplus should be returned to West Virginia, and those contract holders of Indiana unprotected by a deposit statute should look solely to the West Virginia deposit fund, which was done.

In Ohio a deposit law was enacted in 1938, protecting all contract holders who purchased Fidelity contracts after that time. The Circuit Court of Franklin County held that such contract holders protected by the deposit should be paid the full amount of their cash surrender values, without interest, and the surplus, by agreement with the West Virginia Receivers, amounting to approximately $265,000.00, was used to pay off unprotected contract holders, pro rata, according to their cash surrender values, to the extent of the fund, which amounted to a 15% dividend.

In Wisconsin, the Supreme Court of that State held that the deposit fund should be used to pay contract hold-

ers of Wisconsin 100% of their cash surrender values, but without interest thereon, and the balance of slightly over $300,000.00 was to be returned to West Virginia, which was done.

In Maryland and Kentucky the deposit fund was used to pay off contract holders on the cash surrender value basis, and they were able to pay their contract holders, respectively, 90% and 88% of such values.

In Virginia and Pennsylvania the deposit fund was a stated and nominal amount, which deposit funds were turned over in toto to West Virginia after expenses were paid, and their contract holders paid primarily and originally from the West Virginia deposit fund.*

In West Virginia, in the case there pending, entitled "*Edgar B. Sims, Auditor, etc.,* vs. *Fidelity Assurance Association,*" in the Circuit Court of Kanawha County, after notice to all contract holders and extensive hearings were held, the Honorable John J. D. Preston, Special Commissioner in Chancery, filed his report with the Court, recommending that all the contract holders of non-depositary states should share equally with the West Virginia resident contract holders, in the distribution of the deposited assets, and that the basis of payment should be the cash surrender values of their contracts. The Circuit Court of Kanawha County, upon hearing, after notification, confirmed this report and no exception was taken by any contract holder to that ruling.

Furthermore, the Court held that the contract holders in depositary states who were paid upon the same basis as those paid by the Receivers in West Virginia, and who did

*Note—The total amount returned to the West Virginia Receivers by officials of other states, including the $265,000 surplus of the latter Ohio deposit fund, as a gross amount, but including payments for the benefit of some contract holders not previously located, was approximately $1,171,605.61.

not receive the same percentage of dividends as did those paid by the West Virginia Receivers, should receive from the West Virginia deposit fund amounts sufficient to equalize them with the contract holders who were paid from such fund.

Thus all contract holders from non-depositary states, and West Virginia contract holders, together with the contract holders of Virginia and Pennsylvania, and those who were unprotected by deposits in Indiana, Kansas and Ohio, have all been paid to date 85% of their cash surrender values, and the Court has authorized the Receivers, in the very near future, to pay a further 15% dividend to all such contract holders, and a further dividend to contract holders of Maryland and Kentucky, so that all contract holders throughout the United States will within a brief period of time have received 100% of the cash surrender values of their contracts.

At a later time, if funds are available therefor, and it now appears they will be, the Circuit Court of Kanawha County has decreed that all contract holders in the United States, both from depositary and non-depositary states, who have received 100% of the cash surrender value of their contracts, will receive interest, equally and pro rata, depending on the amount of the fund remaining.

A list is given below of the number of contract holders of the non-depositary states whose officials have joined in this brief as *amici curiae,* together with the total amount which they will have received as 100% payment of their cash surrender values. These figures are not absolutely accurate, but are fairly close approximations, and sufficient to indicate to the Court the interest of these officials as *amici curiae.*

Contract Holders		*Cash Surrender Value*
Florida	119	$ 97,946.02
Georgia	254	159,164.28
Michigan	3,158	1,447,607.32
Minnesota	284	176,837.13
Texas	89	37,829.08
Total	3,904	$1,919,383,83

The West Virginia Receivers have paid 21,764 claimants, either primarily, or because of claims-over from other depositary states, the sum of $11,853,150.73, with the further 15% dividend not included.

The officials of depositary states have paid 18,566 claimants, excluding Tennessee, the sum of $8,581,198.15.

Hence, it is readily seen that there is a definite financial interest for the contract holders, as represented by those filing the *amici curiae* brief, to be protected, wherefore this brief is filed, and joined in by the many parties hereto.

Therefore, the failure of Tennessee to return the surplus of deposit to West Virginia will cut down the amount that each contract holder in West Virginia, and each contract holder in the non-depositary states, and each contract holder in the depositary states, will and should receive, and all such contract holders are aggrieved and damaged by the final judgment of the Supreme Court of Tennessee.

Furthermore, the Attorney General of West Virginia is advised that the cash surrender value contract holders in Tennessee who were fully protected originally by a deposit made for their benefit in West Virginia, which under the laws of West Virginia was transferred to the

Insurance Commissioner of Tennessee in accordance with statutes enacted in 1939 for that purpose, under the decision of the Supreme Court of Tennessee, would receive only 70 to 75% of the cash surrender value of their contracts, without interest thereon.

This is grossly unfair because the amount so transferred by the Auditor of West Virginia to the Insurance Commissioner of Tennessee, by the statutes of both West Virginia and Tennessee, was to be for the protection, and sole protection, of such persons; and such transfer would not have been made by the Auditor of West Virginia had it been anticipated that the courts of Tennessee would later construe the depositary statute to mean that the trust lien of such persons was to be dissipated, and the deposit in Tennessee be used as general assets to pay Tennessee residents damages for breach of contract.

The Attorney General of West Virginia is further advised that there are no general assets of Fidelity in the possession of the West Virginia Receivers, and that the sole amounts in their hands are the assets derived from the liquidation of the deposit trust fund.

Therefore, to allow certain residents of Tennessee to recover general claims for damages for breach of contract in an amount in excess of that which can be paid by the West Virginia Receivers to all other such contract holders throughout the United States, of which there are more than fifty thousand, would be to give an unlawful preference to such persons, in violation of the Constitution of the United States, and directly in opposition to two decisions of this Court which forbade the Supreme Court of Tennessee earlier to do that very thing. See, *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432.

Therefore, the Attorney General of West Virginia on behalf of the Auditor of West Virginia and the officials

and Attorneys General of the various depositary and non-depositary states who are interested in this matter, and properly so under the decisions of this Court (see, *Pennsylvania and Ohio* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117), respectfully request this Court that it grant the writ of certiorari prayed for by petitioners, and review this case, and correct the inequitable, unlawful and unconstitutional situation which has arisen by reason of the three unpublished decisions of the Supreme Court of Tennessee, affirming the three decisions of the Court of Appeals of Tennessee.

Respectfully submitted,

EDGAR B. SIMS,
Auditor, etc., of West Virginia,
By: IRA J. PARTLOW,
Attorney General of West Virginia.

CHARLES R. FISHER,
Insurance Commissioner of Iowa,
By: BEN C. BUCKINGHAM, *his Attorney.*
HOWARD M. WARNER,
Commissioner, Michigan Corporation and Securities Commission,
By: FOSS O. ELDRED, *Attorney General, his Attorney.*
GROVER SELLERS,
Attorney General of Texas.
EUGENE COOK
Attorney General of Georgia.
J. TOM WATSON,
Attorney General of Florida.
J. A. A. BURNQUIST,
Attorney General of Minnesota.
CLAIR JOHN KILLORAN,
Attorney General of Delaware.

BARTON E. GRIFFITH,
Kansas Ancillary Receiver,
By: E. H. HATCHER, *his Attorney.*
PETER F. HAGAN AND I. H. KREKSTEIN,
Pennsylvania Ancillary Receivers,
By: ALEXANDER N. RUBIN, *their Attorney.*
DEWEY S. GODFREY,
Missouri Ancillary Receiver,
By: RUDOLPH K. SCHURR, *his Attorney.*
J. W. JONES
Kentucky Ancillary Receiver.
DALE DUNIFON, (Wm. Dale)
Special Master Commissioner in Ohio.
S. LEIGH CALL,
Deputy Liquidator, formerly in Charge in Illinois.
ROBERT M. RIESER,
a Wisconsin Contract Holder.
JOHN B. GONTRUM,
Insurance Commissioner of Maryland,
By: GUY B. BROWN, *his Attorney.*
ALEX W. NEAL, JR.,
Virginia Ancillary Receiver,
By: T. NELSON PARKER, *his Attorney.*
FIDELITY TRUST COMPANY AND WILLIS N. COVAL,
Ancillary Co-Receivers in Indiana,
By: DAVID M. LEWIS, *their Attorney.*